IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

RANDALL RICHARDSON,)
Appellant,) C.A. No. K11A-09-009 TJV
v.)
BOARD OF COSMETOLOGY & BARBERING OF THE STATE)
OF DELAWARE,)
Appellee.)

Submitted: May 1, 2012 Decided: August 30, 2012

Richard L. Abbott, Esq., Abbott Law Firm, Hockessin, Delaware. Attorney for Appellant.

Eileen Heeney, Esq., Department of Justice, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's
Appeal From Decision of Board of
Cosmetology & Barbering of the State of Delaware
AFFIRMED

VAUGHN, President Judge

Richardson v. Board of Cosmetology C.A. No. K11A-09-009 JTV August 30, 2012

ORDER

- 1. This is an appeal from a decision of the Board of Cosmetology and Barbering ("the Board"). The case commenced with the filing of a complaint against appellant Randall Richardson, a licensed cosmetologist, by the Department of Justice. The matter was heard by the Chief Hearing Officer of the Division of Professional Regulation. The Chief Hearing Officer issued a written "Recommendation of the Chief Hearing Officer" which contained findings of fact, conclusions of law, and a recommendation that the appellant's license be suspended for 90 days, that he be placed on probation for a period of a year, and that he pay a civil penalty in the amount of \$750.
- 2. The facts as determined by Chief Hearing Officer are briefly summarized as follows: the appellant was the licensee, owner, operator, manager and registrant of the Trilogy Salon and Day Spa in Newark; the appellant has been a licensed cosmetologist since 1993; his wife, Sharon Richardson, sub-leased space in Trilogy as a nail technician between 2002 and 2008, and between December 31, 2010 and March 9, 2011; Mrs. Richardson did not have an active license to perform nail technician services during this time period; her license expired in 2002; in 2008 the appellant was advised by the investigator from the Division of Professional Regulation that Mrs. Richardson did not have a licence and she needed one to perform nail technician services; she applied for and received an apprentice license in December 2009; she received a temporary permit in March 2010 and on March 9, 2011 was issued a Nail Technician license, set to expire March 31, 2012; and that the

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appellant violated the provisions of 24 *Del. C.* § 5113(a)(7) by knowingly leasing space to an unlicensed person to perform nail technician services at Trilogy.

- 3. After the Chief Hearing Officer issued his report and recommendations, the appellant filed exceptions with the Board. Thereafter, the Board considered the Chief Hearing Officer's report and recommendations and the exceptions at a regularly scheduled meeting. They then voted unanimously to approve the Chief Hearing Officer's report and recommendations. Shortly thereafter, the Board issued a written order adopting the Chief Hearing Officer's report and recommendations.
- 4. On appeal the appellant makes the following contentions. First, the Board failed to make a proper record from which a verbatim transcript could be prepared of the meeting at which it voted to approve the Chief Hearing Officer's report and recommendations. This failure, the appellant contends violates 29 Del. C. § 10125(d). Second, the Board failed to take a necessary procedural step of formally appointing the hearing officer to hear the case. The statute which created the office of Chief Hearing Officer, 29 Del. C. § 8735(t)(1), he contends, does not automatically assign a case to the Chief Hearing Officer. Since the statute does not automatically assign a case to the Chief Hearing Officer, he contends, the Board had the option under 29 Del C. § 10125(a) to hear the matter directly itself or designate a subordinate to hear it. In this case, he further contends, the Board failed to do either. Third, the Board ignored the appellant's exceptions to the report and recommendations, failed to consider the progressive penalty provisions of 24 Del. C. § 5114, and failed to discuss the appropriateness or inappropriateness of the recommendations. He further contends that the Board and the Chief Hearing Officer

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failed to consider mitigating factors, including that the discipline imposed is excessive in that it fails to take into account the lack of harm to the public, that the appellant was not the shop owner or Mrs. Richardson's employer in 2011, and that the suspension for 90 days will actually constitute a suspension for a minimum of six to seven months. Failure to consider mitigating factors, the appellant contends, renders the Board's decision arbitrary and capricious. Fourth, the penalty of license suspension is prohibited as a matter of law from being imposed upon the appellant. The fact that his violation was committed in his capacity as the registrant for the shop license, not under the auspices of his cosmetologist license, precludes the suspension. In other words, the appellant contends that his offense was a violation of his shop owner license and not his cosmetologist license. Since there was no violation of his cosmetologist license, he contends, suspension of his cosmetologist license was barred by 29 Del. C. § 10134. That section provides that no license shall be suspended unless the licensee fails to comply with the lawful requirements for retention of such license. Fifth and finally, the appellant contends the Chief Hearing Officer lacked jurisdiction to conduct the hearing in this case. He contends that under 29 Del. C. § 8735(t)(1), the Chief Hearing Officer is authorized to hold hearings in "case decisions" under Subchapter III of Title 29. Proceedings involving licenses, he contends, are governed by Superchater IV of Title 29, and, therefore, not included within the Chief Hearing Officer's statutory jurisdiction.

- 5. The appellee contends that the proceedings below were correctly conducted and that the Board's decision should be affirmed.
 - 6. "On appeal from a decision of an administrative agency the reviewing

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court must determine whether the agency ruling is supported by substantial evidence and is free from legal error." "Substantial evidence is more than a scintilla and less than a preponderance." Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." On appeal, the court does not weigh evidence, determine questions of credibility, or make its own factual findings. If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.

7. The statute creating the office of Chief Hearing Officer gives that person the power to conduct hearings, including evidentiary hearings.⁶ It provides that the testimony or evidence admitted at such a hearing shall have the same force and effect as if taken or received by the board or commission. It further provides that the Chief Hearing Officer shall submit to the board or commission findings and recommendations. It further provides that the findings of fact made by the hearing officer are binding upon the board or commission. It further provides that the board

¹ Stoltz Management Co. v. Consumer Affairs Bd., 616 A.2d 1205, 1208 (Del. 1992)(citing State Dept. Of Labor v. Medical Placement Services, Inc., 457 A.2d 382, 383 (Del. Super. 1982).

² Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981).

³ Majaya v. Sojourners' Place, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).

⁴ *Id*.

⁵ City of Newark v. Unemployment Ins. Appeal Bd., 802 A.2d 318, 323 (Del. Super. 2002).

⁶ 24 Del. C. §§ 5100-22; see 29 Del. C. § 8735 (v)(1).

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or commission may not consider additional evidence. It does gives parties an opportunity to file exceptions with the board or commission. It further provides that the board or commission shall make its final decision to affirm or modify the hearing officer's recommended conclusions of law and proposed sanctions based upon the written record.

- 8. In this case a complete record was made before the Chief Hearing Officer. The record includes a transcript of the testimony taken, exhibits received, and the Chief Hearing Officer's fifteen page findings, conclusions and recommendations. In this case the Board approved the Chief Hearing Officers conclusions of law and recommendations for discipline without any modification. Under these circumstances, I find that the record created by the Chief Hearing Officer satisfies the requirements of making a record. I am not persuaded that the law requires the Board to create a record from which a verbatim transcript can be prepared of the meeting at which it votes where the Board approves the conclusions and recommendations of the Chief Hearing Officer without modification. Therefore, the appellant's first contention is rejected.
- 9. The statute creating the office of Chief Hearing Officer and describing his powers and authority does not contain any requirement that the hearing officer be formally designated to hear the case.⁷ The statute appears to give the Chief Hearing Officer broad authority to conduct hearings for boards and commissions. I am not persuaded that the statutes relied upon by the appellant require the Board to make a

⁷ *Id*.

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formal designation of the Chief Hearing Officer to hear the case. The process by which a decision is made that the Chief Hearing Officer will hear a case is administrative, and no error arises from the absence of a document formally designating the Chief Hearing Officer to hear the case. Thus, the appellant's second contention is also rejected.

- 10. The appellant's third contention, that the Board failed to consider the allegedly excessive nature of the penalty and that the Board and Chief Hearing Officer failed to consider all mitigating factors, is not supported by the record and is, therefore, rejected. The Chief Hearing Officer fully explained the reasons for his recommended discipline and they are supported by substantial evidence. Therefore, the appellant's third contention is rejected.
- 11. After reviewing 24 *Del. C.* §§ 5113 and 5114, and the other provisions of Chapter 51 of Title 24, I conclude that Chapter 51 permits the Board to suspend all licenses issued pursuant to that chapter if grounds for discipline under the chapter are established. The chapter does not draw the sharp distinction between licenses which the appellant advocates, insofar as discipline is concerned. I therefore reject the appellant's fourth contention.
- 12. Subchapter IV of Chapter 101 of Title 29 sets forth a number of provisions regarding granting, revoking, withholding, suspending, or otherwise acting

⁸ The appellant's attorney was at the meeting of the Board where the Chief Hearing Officer's report and recommendations and the exceptions were considered. The appellant's brief offers the attorney's impressions of the attentiveness or lack of attentiveness of the Board members to the exceptions and other aspects of the Board meeting. However, the attorney's impressions are not part of the record.

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upon licenses. I conclude, however, that Subchapter IV does not set forth a sole and exclusive procedure for discipline concerning licenses. The definition of a Subchapter III case decision in the statute is broad enough to include the proceeding which took place here. The appellant's fifth contention is also rejected.

13. Therefore, the Board's decision is *affirmed*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary

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